The Central Law Journal.

ST. LOUIS, SEPTEMBER 14, 1883.

CURRENT TOPICS.

Snow v. Gould, 74 Me. 540, is an interesting case illustrating some of the limitations upon the rule excluding evidence of communications between counsel and client on the ground of privilege. There, the circumstances were rather peculiar. A party wrote to his lawyer to bring suit for divorce at an early day, in order that his wife might have time to think the matter over, and perhaps consent to a private separation, and thereby avoid as much public scandal as possible. He orally instructed his counsel to withdraw the suit if a jury trial could not be avoided. The lawyer afterwards brought suit for compensation for the services so rendered, and was allowed upon the trial against objection, to introduce evidence of the written and oral instructions for the purpose of showing the nature of the services required of him. The court held that this ruling was right, and that such evidence should not have been excluded as confidential communications, saying: "All that a client says to his attorney is not to be rejected as privileged communication. The privilege does not extend to extraneous or impertinent communications. It does not reach cases where the matter is not of a private nature. Nor where the 'attorney was directed to plead facts to which he is called to testify.' And privileged communications may lose their privileged character by the lapse of time. That which may be private at one time may not be private at an after time. Directions to an attorney to make a certain contract are a confidential communication before but not after the contract is made. A solicitor cannot be compelled to disclose the contents of an answer in equity before it is filed, but may be afterwards. There are numerous examples of these principles in these books: Bouv. Dic. Con. Com.; 1 Greenl. Ev., sec. 244; Neal v. Patten, 47 Ga. 73; Nave v. Baird, 12 Ind. 318. See, as bearing significantly upon this case, Rochester City Bank v. Suydam, 5 How. Pr. 254. * * * It will be seen that this was mostly of the nature of instructions, and instructions that have been executed. No fact in the case is exposed. No secret is let loose. There is nothing in all of it that at this day can be prejudicial to the plaintiff. Such a letter might come decorously from any petitioner for divorce. It would not have been an improper paper to exhibit before the court. The oral evidence should be regarded as a private matter before divorce, but has no importance after the divorce. In the case under consideration, it was competent for the defendant to show the nature of his engagement and of the services performed. We do not see that the evidence exceeded these bounds."

LIABILITY OF JOINT PROMISORS AS AFFECTED BY PAYMENTS MADE BY ONE OF THEM.

Often has the complaint been made in business and legal circles of the lack of uniformity of the law governing some important points relative to commercial paper. That it is important that the law governing the negotiability of notes, bills and checks should be settled and made permanent, needs no argument. The necessity that it should be so is made apparent by the effect that the want of it produces upon the business of every day. It would work far better to the community at large, that the rule should remain as fixed as the laws of the ancient Medes and Persians, than to be liable to be changed by the peculiar circumstances of each particular case. There are instances where a certain rule has been established by the decision of a case upon its circumstances, which, upon reflection, has been found to be erroneous in principle, and reason has suggested a change. Notwithstanding the strong argument to the contrary, the doctrine of *stare decisis*, which is ever a favorite maxim of the law with the judiciary of this country and of England, has caused some of our most eminent jurists to follow the rule of law as first declared. The result of these two counter opinions is a conflict of decision, whereby much difficulty is entailed upon the profession, and the commercial interests of many suffer by reason of the uncertainty of the law. Of the many instances that could be cited, there is none so extensive in its application, or more noted as an

illustration of what has been prefaced, than the question of how far the partial payment of principal and interest by one of two or more joint promisors will remove the bar of the statute of limitations as to the rest. The different rules adopted in England and in the several States of the Union has made this question one of uncertainty, and which may continue to vex the profession at large, unless a fixed rule should be finally agreed upon and established by inter-State legislation. Such an important question relating to commercial paper should not be left in doubt as to the correct rule that should govern it, because it is important to the parties whose interests are at stake, that they know their respective rights and liabilities. It is important to the holder of a promissory note that the law be established, else he might mistake the extent of his remedies. And it is equally important to the promisors that they know the extent of their liabilities as affected by the act of a joint promisor.

In England, the first case which we find reported where this question came up for decision is that of Whitcomb v. Whiting,[1] decided in 1781. This was a suit brought on a joint and several promissory note executed by four persons. The interest and a partial payment was paid by one of the joint promisors within six years, and it was sought to hold the other promisors by reason of such payments having been made. The defendants pleaded the Statute of Limitations in bar, but the court held that they were liable. Lord Mansfield, in his opinion on a rule for a new trial, says: "Payment by one is payment by all; the one acting virtually as agent for the rest, and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay when the debt is admitted to be due." Willes, J., concurring, says: "The defendant has had the advantage of the partial payment, and therefore must be bound by it."

Following close upon that of Whitcomb v. Whiting we find Jackson v. Fairbank,[2] decided in the year 1784, in which the principle laid down in Whitcomb v. Whiting was directly affirmed, and carried one step further, and it was declared that even a dividend out of the estate of a co-promisor who had become a bankrupt, received by the payees of a joint and several promissory note, within six years, was sufficient to remove the bar of the statute as to the others. The next case chronologically is Brandran v. Wharton[3] (1810), in which the doctrine of Jackson v. Fairbank was overruled, as carrying the principle declared in Whitcomb v. Whiting too far, however, reaffirming the latter case. Atkins v. Tredgold[4] (1823), affirms the principle as above stated, but the four judges delivering their opinions distinctly repeat that the doctrine should not be extended. Perham v. Raynal,[5] decided in 1824, was also a case in point, with the exception that the note sued upon was a joint promissory note, while the above were all joint and several notes. In this case the authority of Whitcomb v. Whiting is affirmed and held to establish sound doctrine. Three years later, Burleigh's Executors v. Stott,[6] came up and was determined. This was a suit on a joint and several promissory note by the executors of Burleigh, the payee, against the executors of the surety, where the principal had paid the interest within six years, and the defendants relied on the bar of the Statute of Limitations to escape liability. The Court of King's Bench held, affirming the principle above cited, that the plaintiffs were entitled to recover. Lord Tenterden, C. J., saying: "I think that in this case there was sufficient evidence of a promise by the intestate within six years to pay jointly and severally according to the form of this note. Suppose the note had been joint only, there could not have been any doubt that a part payment by one of the joint promisors would refer to the nature of the note, and operate as an admission by all the joint promisors, that the note was unsatisfied, and therefore as a promise by all to pay the residue. Here the note is joint and several, and the plaintiffs are bound to sue as if it was the several note of the intestate, because Stott, one of the joint promisors, is dead. * * * * I am of opinion that a part payment by one is an admission by both that the note is unsatisfied, and that it operates as a promise by both to pay according to the nature of the instrument,

1 Douglass, 652.
2 2 H. Blackstone, 340.
3 1 B. & Ald. 463.
4 2 Barn. & Cress. 23.
5 2 Bingh. 306.
6 8 Barn. & Cress. 35

and consequently as a promise by the defendant's intestate to pay on this his several promissory note." Bayley, J., concurring.

Holroyd, J., says: "Whitcomb v. Whiting,[7] and Jackson v. Fairbank,[8] are in point, and must govern the present case. It conceded that part payment by one of two joint promisors within the six years being an admission that the note was unsatisfied, operates as a promise by both to pay the joint note. I also think that such payment operates as a promise to the full extent of the original promise contained in the instrument. The joint and several promises apply to the same sum of money. It was a joint debt, though there was a several promise by each to pay it. * * * * It seems to me that where two persons jointly and severally promise to pay one and the same sum of money, each of them makes the other his agent for the purpose of making any payment in respect of that sum of money."

I have quoted quite largely from this last cited case in order to show the reasoning by which the authority of Whitcomb v. Whiting was upheld, and that although fifty years had elapsed, the same argument was used to sustain the doctrine as Lord Mansfield had used when he delivered the opinion in that case. Notwithstanding the frequency with which the soundness of this leading case has been questioned, and the endeavors made at different times to overthrow it, there is not a single *dicta* to be found in any of the cases bearing on this question, which can be construed as holding adversely. This was the settled rule of law in England until the year 1856, when the statute 19 & 20 Vic., ch. 97, sec. 14 was passed, whereby it was completely changed. The substance of that act was, that no partial payment of the principal or interest by one joint promisor would remove the bar of the Statute of Limitations as to the other joint contractor.

In this country we find that the question has vexed the minds of some of our most eminent jurists, and as a doubtful question it has given rise to a conflict of decisions. In some of the States of the Union, the ruling of the English authorities has been been adopted; in others the very opposite doctrine is held, while in several States an intermediate ground is taken. In Maine,[9] Massachusetts,[10] Vermont,[11] Indiana,[12] Ohio,[13] Kentucky and California, the doctrine of Whitcomb v. Whiting, was fully recognized but in each State the legislature has changed the rule so that the former doctrine is entirely repudiated.

Connecticutt,[14] Rhode Island,[15] New Jersey, Maryland [16] and Wisconsin,[17] hold still to the old ruling, mainly on the ground of *stare decisis*. Beasley, C. J., of New Jersey, in a recent case Merritt v. Day,[18] lays much stress on this maxim of law, holding that the opinions of jurists as declared and acquiesced in for years, should be entitled to respect and weight, especially where the result of a contrary opinion would be to render unstable a branch of the law which above all others should be fixed and uniform. In a majority of States of the Union the decisions of the courts have been opposed to the doctrine as just reviewed. These States are New Hampshire,[19] New York,[20] Pennsylvania,[21] North Carolina,[22] Georgia,[23] Alabama,[24] Mississippi,[25] Tennessee [26] and Nebraska.[27]

New Hampshire was among the first States to denounce as unsound the authority of Whitcomb v. Whiting. Richardson, C. J., in Exeter Bank v. Sullivan,[28] declaring that the question should be decided on sound legal principal, says: "We are satisfied that the statute of limitations was intended to be a statute of repose. It is a wise and beneficial law, having a tendency to produce adjustments of affairs between parties while they remain fresh in their recollection, and before

7 Douglass, 652.
8 2 H. Bl. 340.

9 Getchell v. Herald, 7 Gr. 26.
10 Sigourney v. Drury, 14 Pick. 387.
11 Joslyn v. Smith, 3 Weston 353.
12 Dickenson v. Turner, 12 Ind. 223.
13 Hance v. Hair, 25 Ohio St. 365.
14 Colt v. Tracy, 8 Conn. 267.
15 Perkinsadon v. Barstow, 6 R. 88.
16 Schindle v. Gates, 46 Md. 604.
17 Eaton v. Gillet, 17 Wis. 435.
18 9 Vroom 32.
19 Exeter Bank v. Sullivan, 6 N. H. 124.
20 Van Keuren v. Parmalee, 2 N. Y. 523; Bogert v. Vermilea, 10 Bar. 32; Dunham v. Dodge, 10 Id. 566.
21 Coleman v. Fobes, 22 Pa. St. 156; Clark v. Burns, 5 Norris 502.
22 Davis v. Coleman, 7 Iredale 413.
23 Tillinghast v. Nourse, 14 Ga. 641.
24 Knight v. Clements, 45 Ala. 89.
25 Briscoe v. Mitchell, 28 Miss. 361.
26 Muse v. Donaldson, 2 Humph 166.
27 Dayberry v. Willoughy, S. C. Neb., 18 Jan. 1877.
28 6 N. H. 124.

time in its lapse has thrown darkness and obscurity upon them. It is neither unjust nor discreditable to take advantage of the statute, especially in the case of a surety. * * * Those who hold that an acknowledgment or partial payment of the debts, by one may take a case out of the statute as to all the joint debtors, found their opinion upon the ground, that the bar, created by the statute, rests entirely upon the presumption that the debt has been paid and that such an acknowledgment or payment removes the presumption and revives the original promise. And they conclude, and if this be a correct view of the subject, very justly conclude, that in this, as in other cases, an acknowledgment by one of many who are jointly concerned is evidence against all, sufficient to remove the presumption. This is the explanation given by Best, C. J., in Perham v. Raynal,[29] and this is the explanation given by Lord Mansfield,[30] when he says that payment by one is payment by all.

Those who hold the opinion that an acknowledgment of the debt by one, does not take a case out of the statute as to another joint promissor, rest their opinion on the ground that an acknowledgment of the debt does not in any case take a cause out of the statute and that it is only evidence of a promise which may revive the debt, but not the original promise. * * * If then the admission of a debt does not of itself take the case out of the statute, but is only evidence of a promise which may have that effect, the principle that an acknowledgment by one joint debtor, will take a case out of the statute as to another, falls to the ground. There is nothing left to support it. For although one joint debtor may admit the fact of the existence of the debt, which admission will be evidence of that fact against another joint debtor, still it by no means follows that by such admission he can raise a new promise that will bind another joint debtor. It is not pretended that one can make a new contract in such a case that will bind the other."

In New York and Pennsylvania the books show quite a conflict of decisions, however, the question has been finally determined in both States. In the latter State the question was at first decided squarely on the authority of Whitcomb v. Whiting.[31] Afterwards the same question came up again before the Supreme Court when the former ruling was reversed[32] since when the rule has remained fixed.[33]

In South Carolina[34] and Arkansas,[35] an intermediate ground is taken, holding that a payment of interest from year to year or the partial payment of the principal within the time allowed for the bar of the statute of limitations, will continue the liability of all the parties, while payments made after the bar of the statute had attached, will only continue the liability of the party making them.

In the Federal Courts, the question came before the Supreme Court of the United States, at an early day, when the doctrine of Whitcomb v. Whiting was repudiated.[36]

From the foregoing, we may observe, that with the exception of a few States in this country, the rule of law on this question is directly opposed to that as held in Whitcomb v. Whiting. On the reasonableness of this change there is no doubt, for what good grounds are there for holding that a payment of interest or a small partial payment of the principal by one promisor, insolvent and perhaps in collusion with the obligee, shall create a liability on the part of a joint promisor, who is under no legal or moral obligations to pay.

It is a matter of regret that Whitcomb v. Whiting was ever decided as it was, because the whole difficulty, and the conflict of decisions on the question is directly traceable to it. This decision was a stumbling block to the English lawyers and judiciary, previous to the enactment of the statute whereby it was overruled. However, as the doctrine therein declared has been repudiated in almost every State and country governed by English common law, it only remains for the judiciary of some few States to fall in line and thus secure that uniformity so much desired by those whose vocations in life require them to handle commercial paper.

W. T. Brown.

Lancaster, Pa.

[29] 2 Bingham 306.
[30] Whitcomb v. Whiting, Douglas 652.
[31] Zent's Ex. v. Heart & Eyster, 8 Pa. St. 337.
[32] Coleman v. Fobes, 22 Pa. St. 156.
[33] Clark v. Burns, 86 Pa. St. 502.
[34] Smith v. Caldwell, 15 Rich. 365.
[35] Borden v. Peay, 20 English 295.
[36] Bell v. Promson, 1 Peters 361.

CORPORATIONS—POWER OF EXPULSION.

The power of expulsion of members is said to be incident to every corporation, and is as necessary to the good order and government of corporate bodies, as the power of making by-laws.[1] But this broad statement must be taken with some limitations. The right to deprive a member of a corporation of his rights as such by expulsion, depends in a greater or less degree upon the nature of the corporation and its charter or constitution. It seems this power can not be exercised with respect to joint stock corporations, where the capital is divided into shares and the corporation has for its object pecuniary gain. In such cases, ownership of shares or stock constitutes membership, and to expel the member for any act or omission would be to deprive him of his property by summary proceedings. Accordingly, it is said the company can not divest the member of his interest without his assent;[2] and in case of expulsion, he is entitled to recover the amount of his stock in an action against the corporation. This, however, is only true as to corporations where there is no authority expressly conferred for the expulsion of members. It is otherwise when the charter or articles authorize the company or its directors to forfeit stock for the non-payment of dues.[3]

Causes.—The charter may specify what acts may be sufficient ground for removal; but when it is silent upon the subject of removal, or only grants it in general terms, there appear to be only three causes which will justify expulsion. First. Where the offense committed has no immediate relation to the member's corporate duty, but is of so infamous a nature as to render him unfit for the society of honest men,—as the offenses of perjury, forgery, etc. Second. When the offense is against his duty as a corporator, for which he may be expelled on trial and conviction. Third. When the offense is of a mixed nature, against the member's duty as a corporator, and also indictable by the law of the land.[4] But before a member can be expelled in the first instance, there must be a previous conviction by a jury according to law.[5] It is a condition annexed to the franchise of every member of a corporation, that he will not oppose or injure the interests of the corporate body; and where a member commits an act in direct contravention to the purpose for which it is organized, it has been held the corporation has the express power of expelling such member.[6] In State v. Med. Soc.,[7] it was held that even when the by-laws provided for the expulsion of members, it had not arbitrary power and uncontrolled discretion in the matter, and that courts might investigate the action of the corporation taken under it.[8]

Notice.—While it is true that the corporation has the power expressly or impliedly of removal, it is also true that the member cannot be expelled, without notice of the intention, and reason for explusion, together with

[1] King v. Richardson, 1 Burr. 517; Tidderly's Case, 1 Sid. 14; Lord Bruce's Case, 2 Sti. 819; Smith v. Smith, 3 Devan (S. C), 557; 2 Kent's Com. 297.

[2] 2 Kent's Com. 298; Green's Brice's Ultra Vires, 45-47; People v. Board of Trade, 80 Ill. 134; Evans v. Philadelphia Club, 50 Pa. St. 107; Society v. Commonwealth, 52 Id. 125; Leech v. Harris, 2 Brewst. 571.

[3] Evans v. Philadelphia Club, 50 Pa. St. 107; Society v. Commonwealth, 52 Id. 125; Leech v. Harris, 2 Brewst. 571; Hopkins v. Exeter, L. R. 5 Eq. 63; Rochler v. Mechanics' Aid Soc., 22 Mich. 86; Davis v. Bank of England, 2 Bing. 393; State v. Tudor, 5 Day, 329; Delacy v. Neuse River Nav. Co., 1 Hawk, 274; Ebaugh v. Hendel, 5 Watts, 43. See Waterbury v. Express Co., 3 Abb. (N. S.) 163; State v. Justinian Soc., 15 La. Ann. 73; Bagg's Case, 11 Co. 99; Ang. & Ames' Corp., 238; Hope v. International Financial Soc., W. N. (1876) 257.

[4] Ang. & Ames' Corp. 240; Commonwealth v. St. Patrick's Soc., 2 Binn. 448; Rex v. Richardson, 1 Burr. 517; People v. Med. Soc., 24 Barb. 570; 32 N. Y. 187; Rex v. Liverpool, 2 Burn. 731; Fawcet v. Charles, 13 Wend. 476; Bac. Abr. Corp., *c.* 9; Grant Corp. 264; State v. Chamber of Commerce, 20 Wis. 63; Leech v. Harrison, 2 Brewst. 571; Roehler v. Mechanics' Aid Soc., 22 Mich. 86; People v. Chicago Board of Trade, 40 Ill. 112; People v. New York Commercial Ass'n, 18 Abb. 271; Dickinson v. Chamber of Commerce, 29 Wis. 45.

[5] Commonwealth v. St. Patrick's Soc., *supra;* Leech v. Harris, *supra;* Society for Visitation of Sick v. Meyer, 52 Pa. St. 125; People v. Fire Underwriters, 7 Hun, 248.

[6] Commonwealth v. St. Patrick's Soc., *supra;* People v. Underwriters, *supra;* Page v. Board of Trade, 45 Ill. 112; People v. New York Com. Ass'n, 18 Abb. Pr. 271.

[7] 38 Ga. 608.

[8] For some decisions as to what will be sufficient or insufficient to warrant the expulsion of a member, see People v. Com. Ass'n, 18 Abb. Pr. 271; People v. Sailor's Snug Harbor, 5 Id. (N. S.) 119; Commonwealth v. Philanthropic Soc., 5 Binn. 486; Society for Visitation of Sick v. Commonwealth, 52 Pa. St. 125; Protector v. Kingston, Sti. 478; Rex v. Andover, 3 Salk. 229; Jay's Case, 1 Vent. 302; Commonwealth v. Society, 2 Binn. 441; Green v. African Soc., 1 Serg. & R. 254; Diligent Fire Ins. Co. v. Commonwealth, 75 Pa. St. 291.

an opportunity to be heard in opposition to the charge.[9] In some instances the notice may be dispensed with, as when the party has either appeared at the meeting and defended himself, or answered the charges.[10] It does not seem necessary that the notice should particularize the charges, any further than to give the member an idea of what charges will be brought forward against him, in order that he may be able to properly make his defense.[11] A reasonable time must be given in which to answer the charges, and produce the testimony; and he is also entitled to be represented by counsel, to cross-examine the witnesses and to except to the proofs against him.[12] But when a member has been convicted by a jury for an infamous crime, a vote of expulsion would be legal without any notice or preferment of charges, however necessary those ceremonies might be when the offense concerned the corporate interests.[13]

Restoration.—When a member of a corporation is illegally removed, he may be restored by application to the court. The remedy is by mandamus.[14] But when the association is merely voluntary and not organized for the prosecution of a business, the courts will not interfere to control the manner of enforcing the by-laws; and an expelled member of such an association will not be restored by mandamus.[15]

ADDISON G. MCKEAN.

[9] Black & White Smith Soc. v. Vandyke, 2 Whart. 309; Green v. Af. Meth. Ep. Soc., 1 Serg. & R. 254; Com. v. Penn. Ben. Inst., 2 Id. 141; Com. v. Guardians, 6 Id. 469; Com. v. Pike Ben. Soc., 8 Watts & S. 247; Washington Soc. v. Bacher, 20 Pa. St. 425; Fuller v. Plainfield Acad., 6 Conn. 523; Barrows v. Med. Soc., 12 Cush. 402; People v. St. Franciscus Ben. Soc., 24 How. Pr. 216; People v. N. Y. Com. Ass'n., 18 Abb. Pr. 271; People v. Sailor Snug Harbor, 54 Barb. 532; Delacy v. Neuse Riv. Co., 1 Hawks. 274; South Plank Road Co. v. Hixon, 5 Ind. 165; Leech v. Harris, 2 Brewst 571; White v. Brownell, 2 Daly 329; Sibley v. Cartnet Club, 40 N. J. L. 295.

[10] Willcox Mun. Corp., 265; Or if he be present, it is unnecessary that there be further notice. Conea. v. Penn. Ben. Inst., 2 S. & R. 141.

[11] Rex v. Liverpool, 4 Burr. 734; See Exeter v. Glide, 4 Mad. 37.

[12] State v. Bryce, 7 Ohio 414; Rex v. Richardson, 1 Burr. 540; Rex v. Liverpool, 2 Id. 734; Murdock v. Cleadenry, 12 Pick. 244; Rex v. Chalke, 1 Ld. Raym. 226; Rex v. Derby, Cas. Temp. Harden, 154.

[13] Ang. & Ames, Corp., 246.

[14] Burrows v. Mass. Med. Soc., 12 Cush. 402; Crocker v. Old South Soc., 106 Mass. 489; Sleeper v. Franklin Lyceum, 7 R. I. 523; People v. St. Franciscus Soc., 24 How. Pr. 216; People v. Med. Soc., 24 Barb. 570; People v. St. Stephens Church, 6 Lans. 172; People v. Ben. Soc., 3 Hun. 361; Delacy v. Neuse Riv. Co., 1 Hawks. 274; State v. Georgia Med. Soc., 38 Ga. 608; State v. Justinain Soc., 15 La. Ann; 73 People v. Mich. Aid. Soc., 22 Mich. 86; State v. Chamber of Com, 20 Wis. 68; Society v. Com., 52 Pa. St. 125; Com. v. Soc., 2 Binn. 441; Same v. Franklin Ben. Soc., 10 Pa. St. 357; Same v. German Soc., 16 Id. 251; Evans v. Phila. Club, 50 Id. 107; Cook v. College of Physicians, 9 Bush. 541.

[15] People v. Board of Trade, 80 Ill. 134. As to interference by *certiorari* or injunction, See Gregg v. Med. Soc., 111 Mass. 185; Thompson v. Tammany Soc., 17 Hun. 305; Baxter v. Board of Trade, 83 Ill. 146.

RIPARIAN RIGHTS — LICENSE TO TAKE WATER.

KENSIT v. GREAT EASTERN RAILWAY.

English High Court, Chancery Division, May 2, 1883.

A riparian owner granted a license to a stranger, F, to take water from a natural stream for his factory. The water taken by F was returned to the stream undiminished and undeteriorated. The points of withdrawal and return of the water were on the licensor's land. *Held*, that a riparian owner lower down the stream, who showed no inconvenience caused to himself thereby, was not entitled to an injunction to restrain such user of the water.

The plaintiff Kensit was the freeholder of certain lands in the parish of Mistley, in the county of Essex, through which the defendant company's railway ran, and the plaintiff Glover was his tenant. Prior to the formation of the company's railway and the culvert hereinafter mentioned, there was a natural stream of water flowing through the plaintiff's land, and the plaintiff and the occupiers for the time being of the said lands had always been entitled to have the water of the stream flowing in its natural state through and into the said lands. The defendant company in the year 1854 purchased from the plaintiff Kensit, for the purposes of their railway, a part of his land, carrying their railway accross the stream, and, in pursuance of sec. 68 of the Railway Clauses Act, they made a culvert under their railway to convey the water of the stream from the plaintiff's land on one side of their railway to his land on the other side. The defendant Free was a maltster and saccharine manufacturer, whose factory was situate near to the culvert, but his premises did not border on the stream, and it appeared that by an agreement between the railway company and Free he had been allowed to insert a pipe to intercept the water of the stream as it flowed through the culvert under the company's railway. The water was drawn off through the pipe into a tank on the company's premises, and thence pumped through a suction pipe into Free's factory. The water so taken, after having been used by Free, was returned through another pipe into the stream at a point a few feet below the

point of withdrawal, and within the company's premises.

On the 4th of October, 1881, the plaintiffs brought this action, claiming an injunction restraining the defendants from obstructing the stream or polluting or diminishing or interfering with the water therein, and damages.

By their statement of defense the defendants insisted that the use by Free of the water was within the rights of the defendants, and they alleged that the water so used was used by Free for condensing purposes only, and was not when returned either diminished in quantity or in any way polluted.

The action now came on for trial. There was an allegation in the plaintiff's statement of claim, that by reason of the defendant's acts the flow of water into the plaintiff's premises was both diminished and deteriorated; but at the hearing evidence as to damage was not gone into, the question argued being confined to the point of law whether, assuming that there was no diminution or pollution of the water, the plaintiffs were entitled to an injunction restraining the use of the water.

Barbour, Q. C., and *C. E. Jones*, for the plaintiffs. The question is whether a riparian owner can grant a license to another person who is not a riparian owner to take water from the stream. We submit he can not, and the plaintiffs are entitled to the injunction sought without showing that they sustained any actual damage. The rights of the company as riparian owners are simply to themselves enjoy the uninterrupted flow of water in the manner the law allows to such owners, they can not turn this into a right in gross so as to empower another person to exercise those rights. The case of Wood v. Waud, 13 L. T. Rep. (O. S.) 212; 3 Ex. 748, shows that if a riparian owner pollutes the stream so as to occasion damage in law, though not in fact, to an owner lower down the stream, an action will lie. The rule of law is, *Aqua currit et debet currere ut currere solebat*, and in the present case the defendants claim a right to divert the natural course of the stream. The plaintiffs are entitled to have the stream flow in its natural state without alteration or diminution. Embrey v. Owner, 6 Ex. 353. In Wilts & Berks Canal Navigation Co. v. Swindon Waterworks Co., 30 L. T. Rep. (N. S.) 443; L. Rep. 9 Ch. App. 451-457. James, L. J., says: "It is the right of a riparian proprietor in this country to prevent any other riparian proprietor above him from diverting the stream so as to cause that stream to flow otherwise than in its accustomed channel." Stockport Waterworks Co. v. Potter, 10 L. T. Rep. (N. S.) 748; 3 Hurl. & Colt. 360; Nuttall v. Bracewell, 15 L. T. Rep. (N. S.) 313; L. Rep. 2 Ex. 1; and referred to a decision of the Court of Appeal (reported in the *Times* of the 12th of April, 1883), in Ormerod v. Todmorden Mill Co.

Philbrick, Q. C., and *Smart* for the defendant company, and *Willis*, Q. C., and *Warmington*, Q. C., for the defendant Free. In the cases relied upon by the plaintiffs there was some appreciable injury done by the act of the defendant. There is no case where the plaintiff has succeeded in an action similar to this unless there was some deterioration, as to either quantity or quality, of the flow of the water. No right of the plaintiffs has been violated, they have still all they are entitled to, namely, the flow of the water as it would be if the defendants were not doing the acts complained of. In Swindon Waterworks Co. v. Wilts & Berks Canal Navigation Co., 33 L. T. Rep. (N. S.) 513; L. Rep. 7 E. & I. App. 697-704, Lord Hatherly, after stating that undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for ordinary purposes, goes on to show that under certain circumstances, provided no material injury be done to the proprietor lower down the stream, the water may be diverted from its natural course. The question is, whether or not the plaintiffs' right, which is merely a right of enjoyment, is infringed; it is not like a case of trespass on land, which is the actual property of the owner. They referred to Earl of Sandwich v. Great Northern Railway Co., 10 Ch. Div. 707; Orr Ewing v. Colquhoun, 2 App. Cas. 839; Harrop v. Hirst, 19 L. T. Rep. (N. S.) 426; L. Rep. 4 Ex. 43; Sampson v. Hoddinott, 1 C. B. (N. S.) 590. [Pollock, B., referred to Gale on Easements, 5th ed., p. 228 (note), citing Bickett v. Morris, 14 L. T. Rep. (N. S.) 835; L. Rep., 1 Sc. & Div. App. 47.]

Barber, Q. C., in reply: In Sampson v. Hoddinot, *ubi sup.*, it was held that if the user of the water by the defendant had been beyond his natural right, it mattered not how much the plaintiff had used the water, or whether he had used it at all. In either case the action was maintainable. From that it appears that the plaintiff's right is inherent in his riparirn ownership, not in his exercise of his rights. What the defendants are doing is claiming a right to make an unauthorized use of the water which may lead to injury hereafter. If a riparian owner grants away a portion of his estate to the rear of that part which borders on the stream, he can not grant with it any riparian rights. He referred also to Mayne on Damages, 3d ed., 395; Elmhirst v. Spencer, 14 L. T. Rep. (O. S.) 433; 2 M. & G. 44; and Goddard on Easements.

POLLOCK, B.—The plaintiffs in this case, who are the owners and lessees of land abutting upon a brook at Mistley, in the county of Essex, brought their action against the Great Eastern Railway Co. and Mr. Robert Free, the second defendant, who claims by license under the company, and they state in their statement of claim that they as owners and lessees are entitled to the riparian rights of water both above and below a point at which the Great Eastern Railway Co. crosses the brook upon which the plaintiffs' land abuts, and they then go on to allege that the defendants have interfered with the watercourse running through and by the land of the plaintiffs, and prevented the water in the said watercourse

from flowing on to and through the plaintiffs' land as heretofore. That last is a very material averment when we come to consider what are the plaintiffs' rights in this case. Now, the facts, as admitted, I may say, by the plaintiffs and defendants, are these: It was admitted by the defendants that they took by a culvert from the brook at the points upon which it abutted upon their land a considerable amount of water, which by the culvert passed through the company's land, and then, in pursuance of a grant made by the Great Eastern Railway Co. to the second defendant, went on and supplied the defendant Free with an amount of water sufficient to cool the pipes he used as a malster and saccharine manufacturer upon the land at the back of the railways company's land. That water is returned at a spot very near the inlet by an outlet into the brook, and it was admitted by the plaintiffs that it was returned, and in such a manner that, with regard to the rights of the plaintiffs both above and below, they had, since the acts complained of, had the benefit of the flow of water, both with regard to the quantity and absence of pollution, in the same manner as they had had heretofore. It was also admitted in point of law on the part of the defendants, that the railway company had no right to make any grant to any person who was in the position of Mr. Free, who was a non-riparian proprietor, and whose land was at the back of theirs, and not abutting on the brook. Upon those facts and with those admissions the judgment of the court must be based. Now, I propose very shortly to state the way in which it occurs to me in point of principle. I believe at present that there has been no case which has actually decided the very point in question in the present case, that point being whether, when a riparian proprietor grants to a non-riparian proprietor certain rights which, if exercised, he has no right to grant, though at the same time they do not interfere substantially with the plaintiff's right as to his flow of water, in such a case as that any action, either for damages or for injunction, can be brought by the plaintiff against the defendant. It is essential, no doubt, to consider what is the right to flowing water in these cases, especially because it was sought to establish an analogy between the infringement of a right of that kind and the infringement of a possessorial right which a landowner has in his land; and for this purpose I may simply state that the law of England, and, as far as I am aware, of any other country, never acknowledged the right to flowing water in a person by whose land it flows in the same sense and manner as the possessorial right to land has been acknowledged. It has been spoken of in different ways—as a thing that is a right *publici juris*, a thing that is a natural right, and by other expressions of that kind; but in the result it comes to this, that it is a right of the same character as the right to the pure flow of air, a right of such a nature that the person who enjoys it can not at any time fix upon a particular portion of water to which he is entitled; he can not say of a single pint or globule of water that that pint or globule is his; he can only say that he is entitled to the flow of that water in its accustomed manner, both as to quantity and as to purity. Well, that being so, the cases which clearly show, as they do, that a person who has the possessory right of land may bring successfully an action, either for damages or for an injunction, not merely where some damage is done to his property, but where some right is infringed whereby his title may be put in danger, have not in my judgment any analogy to the present case, because, in the case of land, a person has the absolute property in that land, and a great many acts that may be done, although not actually injuring the land, still may be of such a character that they imperil his future title, and, in particular, may grow into a right by reason of a long user. The only further question then that remains in this, one of the defendants having admitted that as a riparian owner he has no right to grant to a non-riparian owner the use of the water, a question arises whether by that user, although no present damage is done, any right could accrue by efflux-ion of time, and, in my opinion, that is not so. I think that matter, as I will show presently, is tolerably well established by authority, although there has been no expressed decision upon the subject. Now, with regard to the authorities, it is unnecessary, although it is quite right that I should be furnished, as I was very fully, with all the authorities upon the subject, for me to follow them now at any great length, because the proposition that I have shortly laid down with regard to the right to water is very clearly and fully expressed in many judgments of our courts, and in one in particular, which would not be binding upon me in this court as a judgment, but is one to which we always pay the very highest respect as the judgment of Lord Kingsdown, which has been quoted again and again with approbation in our courts in the case of Miner v. Gilmour, 12 Moo. P. C. 131. A very similar proposition was laid down by Pollock, C. B., in the case of Wood v. Wand, 3 Exch. 748, p. 775, which has been cited on numerous occasions. In that case what Pollock, C. B., took as a proper description of the right is taken from 3 Kent's Commentaries, 439, and the proposition is this: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law." That seems to me to be perfectly clear, and to be quite sufficient to express what are the rights of the parties in the present case. Well, then, taking

that judgment of the court in Wood v. Waud, *ubi sup.*, and again in Embrey v. Owen, *ubi sup.*, you find that doctrine very clearly established, and you certainly find nothing in any of the judgments, or in the *dicta* of the learned judges in those cases, which at all shows that an action will lie by a riparian proprietor if there has been no diminution in quantity or purity of the water. Then there are two other cases. One is the case of The Stockport Waterworks Company v. Potter, *ubi sup.*, and the other is Nuttall v. Bracewell, *ubi sup.*, in which that which the defendants have admitted in this case is very clearly established, namely, that a non-riparian proprietor can obtain no right through a riparian proprietor. From both of those judgments the present Lord Bramwell dissented; but it is quite clear that the judgment of the majority of the court is that which has been upheld since, and which must now be acted upon. There is one other case bearing upon this part of the case that requires some little examination, and that is the case of Sampson v. Hoddinott, *ubi supra*. At first sight it might appear there that some countenance was given to the proposition asserted by the plaintiffs in this action. In that case, an upper riparian proprietor, for the purposes of irrigation, retained some water, and there no actual damage was proved, but the water was delayed; and, although there was no actual damage, it was not clear, or rather, one might say perhaps, it was shown to be probable that, if the plaintiff had exercised his full right to the water, then that full right would have been affected, and consequently he would have suffered damage. The same doctrine that was laid down in Sampson v. Hoddinott is to be found in some of the other cases, and is common to a good many other instances in which this branch of law has been administered; that is to say, you are to measure the plaintiff's right, not according to the actual amount he uses of water, but according to the amount of water which he is entitled to use; and therefore, if a mill-owner should stop his mill for two or three months, during which wrongful acts are done by riparian owners above, it would be no answer in such a case to say: "You suffered no damage." The reason why he suffered no damage was simply because he did not choose to work his mill during that period of time. I think it is to that extent only that that case affects the present case. Then there are two cases, one not by any means a modern case, which distinctly show that no cause of action arises unless there is a real injury to the plaintiff. One is the case of Williams v. Morland, 2 Bar. & Cress. 910, and there is a very careful judgment in that case both by Bayley, J., and Holroyd, J., in which the right of a plaintiff and defendant in such a case is very clearly stated. Bayley, J. states, at page 913: "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose." And he goes on to point out that in that case there is no deprivation of the water which has affected the plaintiff. Then Holroyd, J., whose judgments are always particularly short and to the point, says this: "Running water is not in its nature private property, at least it is private property no longer than it remains on the soil of the person claiming it. Before it came there it was clearly not his property. It may perhaps become, *quasi*, the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other person had acquired a prior right to it." Then he cites one of the other cases, and says: "The gravamen of the complaint is not that the water was prevented by the act of the defendant from coming down to the plaintiff's premises, and that he was injured by the want of water, but that it, in fact, flowed in a more impetuous manner, and thereby damaged the plaintiff's banks; but the jury have found that no damage has been done to the plaintiff's bank by the manner in which the water was caused to flow by the act of the defendant. The jury have, therefore, found against the plaintiff in respect of the right of action which he claims. The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover he should show the loss of some benefit, or the deterioration of the value of the premises." That is as far back as the year 1824, and I need not say if no damage is shown, so that the plaintiff can not maintain an action, neither would the court of equity grant an injunction to restrain the defendants from doing the act complained of. That very point did come before a court of equity in Elmhirst v. Spencer, 12 Mac. & Gor. 45, 50, in which Lord Cottenham gives a very clear judgment to the same effect. He says: "Now the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendants, as would have entitled him to a verdict at law in an action for damages. In the manufacturing districts, where there are as many mills along a stream as the water will supply, it would be extremely hard that the proprietor of one of such mills might not divert the stream within his own land, restoring it to its ancient channel before it entered into the lands of his neighbor without a diminution of the usual quantity. In such cases, and in the similar case of alleged obstruction to the use of light, in order to sustain an injunction, there must be both an unwarrantable use and an injury resulting from such use. In the present

instance, however, the defendants' admission is quite consistent with the fact that the plaintiff has sustained no injury; and this court will not take upon itself to adjudicate upon the question of whether this is a nuisance or not." That seems to be a very clear expression of opinion in the same direction as that expressed in Williams v. Morland, and by Lord Blackburn in the case of Orr Ewing v. Colquhoun, *ubi supra*. Then the only remaining proposition is one which I wish to consider very carefully, namely, whether possibly it could be said, as has been said in cases relating to land, that if this act which is now done by the defendants, the diversion of the water, is not interfered with by the plaintiffs, any right could be gained by the defendants. This is an extremely important question, when you remember that the right to the use of flowing water is measured according to the law by the rights of the higher riparian proprietors, who are entitled to use such quantities as they may want for ordinary purposes; and what those purposes may be it is not necessary now to enter into. So that it may occur, if houses are built along the bank of a stream, and each person uses water merely for domestic purposes, that in a dry season those lower down, especially if the stream is some miles long, might not get enough, and therefore, in weighing this part of the case, it is extremely essential to see that we do not put any further burden upon the lower riparian proprietors by letting persons extract water for a purpose which is not *per se* legal. But I myself have no doubt upon that subject. I think the time from which any right would begin to accrue would not be the time at which such a diversion as was made in the present case arises, but the time from which the plaintiff could say that his water right was disturbed in quantity or purity; and there is an authority which bears upon that, namely, Sampson v. Hoddinott, *ubi supra*. In the considered judgment of the court, delivered by Cresswell, J., this is said: "On the part of the plaintiff, it was denied, generally, that a riparian proprietor has any such right; and it was also contended that, at all events in this case, the plaintiff had gained a title to the uninterrupted flow of the stream by immemorial enjoyment. As to the latter proposition, it appears to us that all persons having lands on the margin of a flowing stream, have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not; and that they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify, still there is no evidence of its affecting the defendant's tenement, or the natural use of the water by the defendant, so as to render it a servient tenement." That seems to me to be on all fours with this case, and there the riparian proprietor who complained was above, as, indeed, he is in this case, for some purposes, though he is both above and below. It seems to me that that is a judgment by which I am bound, even if I did not concur in it for other reasons. That, therefore, leads me to the result that, although if this stream were being regulated, say, by act of Parliament—although, if there were a public officer, whose duty it was to interfere with any improper user of the water, it might be a very proper case for his interference—as the law of England does not give out impersonal rights, but only gives a right to a party to come to a court of law or equity when he is damaged in his interest, that in this case no action would lie for damage, and therefore, also, no action for an injunction can be maintained. There is only one other case which might seem at first blush to be a little contrary to this view, and that is the case of Northam v. Hurley, 1 El. & Bl. 665. In that case it was held that an action would lie for the diversion of the channel of a stream contrary to a grant, although there was no diversion of water or actual damage to the plaintiff; and, looking at the judgment in that case, delivered by Coleridge, J., it is quite clear that the court were not dealing there with the natural right to the flow of water, but treated the matter as a grant by the defendant; and they held that what he had done in altering the actual channel of the stream, was in derogation of that grant, and that, therefore, an action would lie. In no other case have I been able to find anything militating against the view I have taken; and in the result, therefore, I give judgment for both defendants.

MUNICIPAL CORPORATION — PROPERTY ACQUIRED ULTRA VIRES — COMPENSATION OR RESTITUTION.

WROUGHT IRON BRIDGE CO. v. TOWN OF UTICA.

United States Circuit Court, Northern District of Illinois, July 13, 1883.

A municipal corporation which has obtained property by means of a contract which it had no authority to make, will not be allowed to retain it without making compensation.

In equity.

C. C. & C. L. Bonney, for complainant; *Lawrence, Campbell & Lawrence*, for defendants.

BLODGETT, J., delivered the opinion of the court:

This case is one which it appears to me is to be solved solely upon the undisputed facts, and those facts are substantially these:

The towns of Utica and Deer Park, situate in La Salle County, in this State, adjoin, and the Illinois river forms the boundary line between them; Utica lying on the north and Deer Park on the south side of the river. On the 14th of February, 1876, an election was held in the town of Utica, at which a proposition for borrowing money, with which to build a bridge across the Illinois river was carried by a vote of the legal voters of the town. On the 20th of May, 1876, a town meeting was held in Deer Park, at which a like proposition was adopted. In pursuance of a notice from the highway commissioners of the town of Utica, a joint meeting of the highway commissioners of these two towns was held in the village of Utica on the eighteenth of March, 1876. This meeting was attended by all the highway commissioners of Utica and one of the commissioners of Deer Park, making four members of the joint body, and having been advised by lawyers in good standing in the profession that in such joint meetings a majority of the entire body was legally competent to transact business, they proceeded to pass a resolution to build a bridge across the Illinois river, at or near the point where the road running south from the village of Utica crosses said river, the cost of which should not exceed $35,000, and to advertise for sealed proposals for the construction of such bridge, and also appointed a committee to obtain plans and specifications for the masonry of such bridge. On the twenty-second of March a further joint meeting was held, which was attended only by the three commissioners of Utica and one from Deer Park, at which the committee appointed by the meeting of the 18th, reported the plans and specfications for the masonry, which report was accepted and the committee discharged, and the form of an advertisement for proposals for the work was adopted and the same ordered published in certain newspapers. On the third day of April, 1876, a joint meeting of the board of highway commissioners of the two towns was held for the purpose of receiving and opening the bids, or proposals, for the building of the contemplated bridge. This meeting was attended by all the highway commissioners of both towns. The bids were opened, and, by unanimous consent of all the commissioners, further business was suspended and the proposals taken under advisement. On the twenty-fifth of May, 1876, a further joint meeting was held, which was attended only by the three highway commissioners of Utica and one from Deer Park, at which meeting a contract for the substructure of the bridge was awarded to Messrs. Fife & Hetherington, for which a written agreement was duly made and executed, signed by the three commissioners of Utica and one commissioner from Deer Park, and the contract for the iron superstructure was awarded to the complainant in this case, and what purported to be a written agreement between complainant of the first part and the commissioners of highways of the town of Deer Park of the second part, was executed and delivered, bearing date on the twenty-fifth day of May, 1876. This agreement seems to have been duly executed by complainant, through its proper officers, but was only signed by the three highway commissioners of the town of Utica, and one highway commissioner of of the town of Deer Park. Another of the highway commissioners of Deer Park signed the contract at or about the time the bridge was completed, giving as a reason for not signing at the time the other commissioners signed, that he chose to wait, before signing, until the time for contesting the election by which the vote in his town to borrow money to build the bridge had passed. By the contracts with Fife & Hetherington, the substructure—that is, the abutments and piers of masonry on which the iron bridge was to rest—was to be completed on or before the fifteenth of August, 1876, and they were to be paid 85 per cent. of their contract price as the work progressed, and the remaining 15 per cent. on the completion of their work. The contract with complainants provided for the completion of the iron superstructure of the bridge by the fifteenth of October, 1876, and the complainant was to be paid the sum of $17,400 for said superstructure. A contract was also made between complainant and the highway commissioners of Utica, contemporaneously with the bridge contract, by which it was agreed in substance that Utica should only be liable to complainant for one-half the cost of the superstructure, until Utica should have collected the other one-half from Deer Park, and in case Deer Park failed or refused to pay its one-half of the cost of the bridge, the highway commissioners of Utica would bring suit against Deer Park to recover the money due from Deer Park for the construction of the bridge. On the first of June, 1876, and before complainant had done any work on the bridge, a notice was served by the supervisor of Deer Park on the highway commissioners of Utica, Fife & Hetherington, and the complainant, to the effect that the authorities of Deer Park—that is, the supervisor, clerk, and commissioners of highways—had decided, under legal advice, that the town of Deer Park had no authority, under said vote, to issue its bonds for the purpose of building said bridge, and that the commissioners of highways of the town could not lawfully enter into a contract for the building of such a bridge, and that no liability of the town on such contract would be recognized, and they were also forbidden the use of the highways of Deer Park for the purpose of constructing such bridge. The bridge was completed according to contract by the complainant, about the twenty-third day of December, 1876, there having been some delay in the work on the substructure which delayed complainant in the com-

pletion of the superstructure, and on the day last mentioned a joint meeting of all the highway commissioners of the two towns was held, at which the bridge was accepted and an agreement in writing made between the highway commissioners of the two towns for the maintenance of the bridge in good order, at the equal cost of the two towns. The town of Utica issued its bonds the amount of $19,000, the proceeds of which were applied to the payment of Fife & Hetherington on their contract, as the money became due; and the town of Utica also paid to complainant $2,609.45, to apply on complainant's contract for the superstructure; that is, when the materials for the superstructure arrived at Utica, the freight on the same, amounting to $2,609.45, was paid by that town and charged or debited to the complainant. At the September meeting, 1877, of the board of supervisors of La Salle county, the sum of $7,000 was appropriated to aid Utica and Deer Park in the construction of this bridge, and as it then appeared that Utica had paid all that had been paid towards the work, it was ordered that $3,500 of said appropriation be paid to Utica, and the same was so paid, and at the March meeting of said board, 1882, the balance of said appropriation was ordered paid to the town of Utica. After the completion of the bridge, the town of Deer Park refusing to make any payment whatever to the complainant, and the town of Utica refusing to make any further payment than the $2,609.45 paid for freight on materials, complainant brought an action of *assumpsit* against the two towns in the circuit court of La Salle county, which resulted in a judgment by default against Utica and against Deer Park, on rial of the issues by the court. Damages were assessed against each town separately at $10,096.83, and one-half the costs. From this judgment an appeal was taken by the town of Deer Park to the appellate court of the second district of this State, where the judgment was reversed, (3 Bradw. 572.) the appellate court holding, in substance, that there was no legal liability on the part of either town to pay complainant for this bridge; the conclusion being briefly that there was no such joint action by the board of highway commissioners of the two towns as made the contract with complainant binding on either town. Thereupon, said cause having been remanded to the circuit court, was again tried and the issues found for the defendants and judgment given against complainant, which judgment was afterward affirmed by said appellate court, and on appeal to the supreme court of this State the last judgment of said circuit and appellate courts was affirmed. 101 Ill. 518. Complainant now brings this bill, upon the ground that, in making the contract for the construction of said bridge, complainant acted under a mistake as to matters of law and fact; and, inasmuch as complainant has no remedy at law, prays that it be allowed by the decree and judgment of this court to take down and remove said bridge.

There can be no doubt, from the testimony in this case, that complainant built this bridge in good faith, in the expectation that it would be paid for by one or both of these towrs. At the time the contract for the construction of the bridge was made with complainant, both these towns had, by a vote of their electors, authorized by the laws of the State (Rev. Stat., ch. 121, sec. 111), decided to borrow money with which to build the bridge. From the nature of the work, the substructure was first to be built, and, as a matter of course, it was the first work to be paid for. There seems to have been no opposing party in the town of Utica in regard to the policy of the enterprise, and as this money became due to the contractors for the piers and abutments, it was paid to them by the commisssioners of highways of Utica, so that by the time complainant's contract was completed, Utica had exhausted its funds in the payment for the substructure, and complainant was left to look to Deer Park for payment of the iron superstructure, although by the contract with complainant, the town of Utica had agreed to pay one-half the cost of the superstructure.

I do not care to spend time upon a metaphysical discussion of the question whether complainant acted under a mistake of fact or a mistake of law in making this contract, or in the building of this bridge in pursuance of the contract. It is not a supposable case that complainant would have built the bridge if it had not expected to be paid for it. The action of the authorities of both towns, up to the time when the formal contract was made, justified, such expectation, and while the complainant may have been wrongly advised in the ma ter, as to how many members of the board of highway commissioners constituted a quorum in a joint meeting of these boards, there can be no doubt that the complainant would not have built the bridge but for the expectation that the bridge would be paid for, which expectation was, as it seems to me, fully justified by the fact that both towns had voted to raise the money for the purpose. To have assumed that the towns were legally bound by the contract of less than a majority of the highway commissioners of both towns, acting in joint session, may have been a mistake of law; to have assumed that they would honestly carry out the expressed will of the voters, and borrow the money and pay for the bridge, without captious objection, was an assumption of fact, and the mistake in acting upon this assumption was clearly a mistake of fact. When the bridge was completed, the highway commissioners of both towns met, had the bridge examined by their engineer, and he reported that plaintiff had in all respects complied with its contract; and if the plaintiff had not been acting, as a matter of fact, under the belief that the bridge would be paid for under the contract, which this joint meeting of highway commissioners had been so careful to ascertain had been fully performed by the plaintiff,

it may be assumed, from all knowledge of human actions, that the plaintiff would never have given to these two towns the possession of the bridge. It was no part of the business of this plaintiff to build bridges gratuitously for the people of these towns, or any other community. The plaintiff was and is a business corporation, taking contracts like this with the expectation that it is to be paid for the labor and material it expends in constructing works like this.

This case seems to me in all essential principles analogous to the case of Chapman v. County Commissioners, decided by the Supreme Court of the United States during its last term. 15 Ch. Leg. N. 193; 2 Sup. Ct. Rep. 62. In that case the county of Douglas, in the State of Nebraska, had bought a farm to be used for the support thereon for the county poor, and a deed conveying the farm to the county had been executed and delivered. One thousand dollars of the purchase money was paid, and the county gave its obligations, secured by a mortgage on the farm, to secure the balance of the purchase money, and the county took possession and made the improvements. When these obligations given for the purchase money became due, payment was refused by the county on the ground that the notes and mortgage given to secure the same were void for want of power to make them. The seller filed a bill to obtain restitution of his property. In the opinion the court say, by Mr. Justice Matthews: "The contract for the sale itself had been executed on the part of the vendor by the delivery of the deed, and his title to it had consequently passed to the county. As the agreement between the parties had failed by reason of the legal disability of the county to perform its part according to its condition, the right of the vendor to rescind the contract and to restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary may be shown. As was said by the court in Marsh v. Fulton Co., 10 Wall. 676-684, and repeated in Louisana v. Wood, 102 U. S. 294-299, the obligation to do justice rests upon all persons, natural and artificial, and if the county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. * * *"

The learned judge, after an examination of the authorities, finds that there is no valid reason why restitution should not be made, and concludes by saying "The conveyance to the county passed the legal title, but upon a condition in the contract which it was impossible, in law, for the county to perform. There resulted, therefore, to the grantor the right to rescind the agreement upon which the deed was made, and thus convert the county into a trustee, by construction of the law, of the title for his benefit. There is nothing, therefore, to prevent the relief prayed for being granted, if it can be done without injustice to the defendant. On this point, it is said, it would be inequitable to decree a rescission of the contract and restoration of possession of the property because the parties can not be placed in *statu quo*. * * * If the relief asked was an unconditional reconveyance of the title and surrender of possession, this would undoubtedly be true; but such is not the case. Any such injurious and inequitable results as are deprecated may easily be averted by the simple payment of the amount due on account of the purchase money."

Tested by this reasoning of the Supreme Court, it seems to me plaintiff's right to the relief asked in this case is clear and undeniable. The delivery of this bridge to the towns of Utica and Deer Park passed to them the apparent legal title, but they have never become the equitable owners. The bridge has not been paid for, and they have therefore no equitable right to keep it without paying for it.

As to the objections interposed by the respective defendants to the relief asked by plaintiff, it is only necessary to say: The town of Utica insists that it has expended a large sum of money in paying for the piers and abutments on which this bridge rests; has paid also over $2,500 to plaintiff to apply on the superstructure,—all of which will be lost if the plaintiff is allowed to remove the iron superstructure; that the town of Utica has actually, in good faith, expended more than its proportion of the construction of the bridge as a whole. The reply to this is that this defendant agreed to pay plaintiff one-half the cost of the iron superstructure, and has repudiated its contract in that regard, and that this plaintiff should not be made a loser by reason of the default of Deer Park to keep faith with Utica and pay its half of the cost of the bridge. While it was agreed that Utica should only pay for half the cost of the superstructure, it was also agreed that it should collect the other half from Deer Park and pay it to complainant, and this it has neglected to do.

In behalf of Deer Park, it is urged that the plaintiff placed the bridge there voluntarily, and in face of the notice from the officers of the town that the town would not pay for it; that the bridge is built upon a public highway of the town; and that the situation of the bridge is analogous to that of a house knowingly built by one man upon the land of another. To which it may be answered, that the plaintiff had as good right to act on the faith that the town would pay for the bridge, because the people had voted to do so, as it had to act upon the notice of the officers of the town that it would not pay for it. There was no attempt on the part of the town to prevent the construction of the bridge, but its proper officers were prompt to accept the bridge, and the people of the town to use it as soon as it was finished, according to the contract; and, if this town has so far used this bridge without intending to pay for it, it can not complain if the court allows the plaintiff to take it away.

The defense on the part of the county of La Salle is that it has contributed $7,000 towards paying for the bridge, of which it will be deprived

if the bridge is removed. This argument would have some force if the county had paid the money to the plaintiff; but the payment of that sum to the town of Utica, which has been applied by that town in the reduction of its own contribution to the bridge, can not, it seems to me, in any way affect the rights of this plaintiff. If the county authorities saw fit improvidently to appropriate this $7,000 where it would not be applied towards paying for the construction of the bridge, it is the misfortune of the county, and not the fault of the plaintiff.

Utica has paid $2,609.45 to apply on plaintiff's compensation for the bridge, but this is so small a proportion of the entire cost of the bridge that it ought not to affect the plaintiff's right to the relief prayed for, inasmuch as the court can adjust the equities of the parties in that regard.

There will, therefore, be a decree entered, that, unless the defendants, the towns of Utica and Deer Park, within ninety days from this date, pay to the plaintiff the amount due upon the contract for the construction of this bridge, deducting the $2,609.45 which has been paid, together with interest upon the balance unpaid at the rate of 6 per cent. from the time of the completion of the bridge, the plaintiff will be allowed to take down the bridge and remove it, under the direction of the proper officer of this court; but that, if the defendants, or some of them, shall not elect to make this payment and thereby save the bridge, plaintiff will be allowed to take down and remove the iron superstructure of the bridge; but before plaintiff so removes the bridge, it will be required to repay the town of Utica the sum of $2,609.45 so paid to plaintiff by said town on account of the bridge.

CRIMINAL PRACTICE — SECOND INDICTMENT—AUTRE FOIS ACQUIT.

STATE v. OWEN.

Supreme Court of Missouri, April Term, 1883.

The first indictment contained two counts; the first for grand larceny in stealing a mare, and the second for the embezzlement of the same. Defendant was convicted on the first count for the larceny, and acquitted on the count for the embezzlement. Judgment was arrested for a defect in the indictment, and a new indictment found for the larceny alone. *Held*, that defendant could not interpose a plea of *autre fois acquit*, and that he was properly convicted of the larceny under the second indictment.

Appeal from Livingston Circuit Court.

On the trial of this case, E. A. Evans, on the part of the State, testified, in effect, that defendant came to his house asking employment, and that he employed him as a work hand on his farm. This was on Saturday. On Monday, when witness proposed to send defendant out to plowing, he said he had clothes in Chillicothe, and would go and get them before he went to work, as he wanted a change of clothing, and requested witness to loan him a horse, promising to be back by three o'clock, P. M. Witness let defendant have the mare, but he never returned, and witness never saw her afterwards. About three months afterwards witness heard of him being in the Richmond jail, where he found him in his cell. Tears were running down his cheeks. He said he had taken my mare to Chariton, Iowa, and sold her to a man for $25; took the money and got on a spree, and then went some miles from there and worked for a man for several days, then stole a horse and took it to Nebraska; stayed there thirty days; stole another horse, and brought it to Missouri and sold it, and that he was then in jail for stealing a horse here. The State also proved by other witnesses that defendant said he sold the mare to a man in Chariton, Iowa, and that he hoped Evans would not be hard with him.

Defendant, in his own behalf, testified that he hired to Evans to work. He told Evans he wanted to go to Chillicothe for his clothes, and proposed to walk, but Evans said, take the horse so as to be back sooner. At the time I got Evans' horse I rode her to Chillicothe, spent the money he had given me to get feed for the horse and books for the children for whisky.

The court instructed the jury on the part of the State: 1st, The jury are instructed, that if they believe from the evidence, facts and circumstances proven in this case, beyond a reasonable doubt, that the defendant got the mare with the intent to steal her, and did convert her to his own use, he is guilty of grand larceny, and in determining the question if intent, they must look to all the facts and circumstances in the case. 2nd. They are instructed that if they believe, from all the facts and circumstances in proof, beyond a reasonable doubt that defendant in the month of April 1879, at Livingston county, State of Missouri, borrowed of E. A. Evans, the mare mentioned in the indictment, and that said mare was the property of said Evans, that defendant never returned said mare, but converted her to his own use, and that at the time defendant so borrowed said mare, he did so with the intent to steal her, or permanently to convert her to his own use without the consent of the owner, they should find him guilty, and assess his punishment at not less than two nor more than seven years in the penitentiary. 3d. The jury are the sole judges of the credibility of the witnesses, and the weight to be given to their evidence, and the jury are not bound to give to the testimony of any witness any other or greater weight than under all the circstances in proof they may believe it entitled to. 4th. Unless the jury believe from the evidence, beyond a reasonable doubt, that defendant took stole and carried away, the mare mentioned in the indictment, as charged therein within three years next before the 28th day of January 1882, they will find him not guilty, unless they further find that for some portion of that time he was absent from the State, or was a fugitive from justice

for the commission of the offense charged; in which case they will exclude the time defendant was so absent from the State, or was a fugitive from justice, from said three years—but unless they are satisfied from the evidence that three full years have not elapsed between the commission of the offense and the 28th day of January, 1882, during which three years the defendant was in this State, and not a fugitive from justice, they will find him not guilty. 5th. If the jury believe from all the facts and circumstances in proof, beyond a reasonable doubt, that the defendant got the mare, described in the indictment, with the intent to steal her, and did convert her to his own use, he is guilty of grand larceny, and that in determining the question of intent, they must look to all the facts and circumstances in proof. 6th. The evidence consists as well of facts and circumstances, as of direct proof, and that proof may be as well made by facts and circumstances as by direct proof. 7th. The jury are instructed that under the law drunkenness is no excuse or justification of crime. 8th. The jury are instructed that a reasonable doubt, to authorize an acquital, should be a substantial doubt and not a mere possibility of defendant's innocence of the crime with which he is charged. 9th. The jury are instructed that, by the statute of this State, the defendant is a competent witness in his own behalf, but the fact that he is a witness, testifying in his own behalf, may be considered by the jury in determining the credibility of his testimony.

The following instructions were given on the part of the defendant: 1st. The court instructs the jury that they can not find the defendant guilty of embezzlement in this case, that he has been acquitted of the same; and if they believe from the facts and circumstances in evidence, that the defendant conceived the intent of stealing Evan's horse after he got possession of him from Evans, they will find him not guilty. 2d. The jury are instructed that if they have any reasonable doubt as to whether the defendant conceived the intent to take the horse before or at the time he got possession of it, they will find him not guilty. 3d. The court instructs the jury, if they entertain a reasonable doubt as to whether defendant first conceived the intent to steal the horse in controversy after he got possession of it, they will find him not guilty.

The jury found the defendant guilty of grand larceny, and assessed his punishment at two years in the penitentiary.

SHERWOOD, J., delivered the opinion of the court:

The defendant was indicted in the Livingston circuit court. The indictment contained two counts: the first for larceny in stealing a mare; the second for feloniously embezzling the same. Upon trial had, the defendant was found guilty on the first count, and not guilty as to the second, and judgment of discharge entered accordingly. For a fatal defect in the first count, the judgment was arrested, and upon another indictment being found for larceny alone, the defendant interposed his plea of *autre fois acquit*. The trial court very properly held that this plea could not prevail, the facts of the case spread upon the record not warranting or sustaining a plea in bar. The statute provides that a person may be indicted for embezzlement and convicted of larceny, or *vice versa*, and in either case he is punished according to the fact as found by the verdict,—whether the indictment charged embezzlement or whether it charged larceny (Rev. Stat. 1879, sec 652); and the section cited further provides that no person so tried for embezzlement or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts.

Had the indictment in this case contained but one count, either for larceny or embezzlement, and there had been simply a verdict of acquital, doubtless under the very terms of the statute, no further prosecution could have been maintained for either of such offenses based on the same facts. But had the indictment contained but one count, and that for embezzlement, and had a trial been had on such count, and the defendant found guilty of larceny, and either expressly or else tacitly not guilty of embezzlement, no one would question but that if the indictment were held bad on a motion in arrest, the defendant could be indicted and tried on an indictment charging larceny alone; and the *status* in this case is not altered in this regard because the pleader has seen fit to make his charge *bifureate* instead of making it in one count as allowed by the statute.

The verdict in this case on the former indictment must be taken as a whole, and not in separate parts. It clearly convicts the defendant of arceny and acquits him of embezzlement; and when a plea of *autre fois acquit* is pleaded, based on such a verdict, it requires but an inspection of it to see that the defendant did not go acquit of the larceny. State v. Bowen, 16 Kan. 475; 1 Bishop on Crim. Prac., sec. 1005 *a*.

2. Although the entry announcing the fact of the *nolle prosequi* as to a former indictment is somewhat obscure, yet we think it sufficiently plain what indictment was intended to be quashed, and the subsequent action of the court upon the indictment last found, shows what construction that court put upon its own entry of record. We will not intend, except upon the very clearest and most satisfactory record evidence of the fact, that a court would commit or sanction such an egregious blunder as to put a defendant upon his trial with no living indictment whereon to try him.

3. The last indictment found was a valid and sufficient indictment, and charged that the larcenius act was feloniously done. There is no substantial objection to it.

4. No discussion is needed respecting the causes alleged in the last indictment as to the absence of the defendant from the State, and as to his being a fugitive from justice, because the Statute of Limitations does not run, where, as here, there

were successive indictments pending against the defendant for the offense for which he was tried; and here the first indictment was found at the January Term, 1880. Rev. Stat. 1879, sec. 1707. State v. Duclos, 35 Mo. 237; State *ex rel.* v. Prim, 61 Mo. 166; Bishop's Stat. Crim., sec. 662. The instructions on both sides taken as a whole correctly declare the law on the subject of larceny as applicable to the facts in evidence, and no valid objection can be urged against them. It may not be amiss, however, to say that nine instructions were given on behalf of the State and three on the part of the defendant, making twelve in all, when the whole law of the case could have been declared by one, or at least by two well drawn and concise instructions.

6. We have no fault to find with the lower court in permitting the prosecuting attorney, after the defendant had testified in chief, to ask him, after cross-examining him to some extent: "Is this all you are willing to tell the jury about the case?" Such words were only equivalent to asking him, "Have you anything more to tell the jury?" The defendant voluntarily testified in his own behalf, and had thus testified and was therefore amenable to the usual rule respecting other witnesses, and it was the privilege of the prosecuting attorney by all proper questions and methods to elicit truth.

7. Granting that there was error in permitting Evans, the owner of the mare, to relate to the jury the confessions of the defendant as to other similar crimes, besides the one for which he was on trial, it is impossible to see how the defendant was in the smallest degree prejudiced thereby, because when on the witness stand, he virtually admitted his guilt,—admitted that he rode the mare off from Chillicothe, where he had been permitted to go out of the kindness of Evans, and he did not pretend that he ever returned the mare, and there was evidence that he had not; and besides his own confessions to several other persons than Evans, show his guilt in the clearest possible light. In such circumstances, it would be out of the question to reverse the judgment. State v. Patterson, 73 Mo. 695; Rex v. Ball, Russ. & Ry. 132; State v. Emory, decided at the last term of this court; State v. Jennings, 18 Mo. 435.

8. The remarks of the prosecuting circuit attorney, if improper, are disposed of by the observations made in the case of State v. Zumbunson, decided at the last term, and by the case of State v. Jowls, and State v. Deekinson, decided at the present term. Therefore judgment affirmed.

NORTON and RAY, JJ., concur; HOUGH, C. J., and HENRY, J., dissent.

Dissenting opinion by HOUGH, C. J.: I am unable to find anything in this record which warrants the statement that defendant virtually admitted his guilt at the trial. He was charged generally with larceny, and for the reason given in the opinion of the majority could not be convicted of embezzlement. The indictment was drawn under sec. 1307 and not under sec. 1322. Edward P. Evans, the owner of the mare, charged to have been stolen, testified that he loaned the mare in question to defendant at his request. The defendant testified that Evans tendered the use of the mare to him. The circuit court charged the jury, in substance, that unless they believed from the testimony that defendant borrowed the mare with intent to steal her, or permanently convert her to his own use, they would find him not guilty; and that if they had a reasonable doubt as to whether defendant conceived the intent to steal the mare before or at the time he got possession of her, why they should find him not guilty.

It was admitted by the defendant at the trial that he rode the horse off, and he did not pretend that he had ever returned her, but neither the fact that he rode the horse off, nor the fact that he did not return her, nor both combined constitute larceny under the instructions given at the trial court and approved by this court in the opinion of the majority. The intent to steal the mare when he borrowed her, or accepted the loan of her, as the fact may be, was necessary to constitute the failure to return the mare, larceny under the indictment in this case; and this intent was not admitted by the defendant at the trial, nor was it confessed by him to any one, certainly not directly, and, as I think, not even by implication. The evidence of other similar offenses introduced in violation of all laws, doubtless settled that question with the jury. In a note to 1 Greenleaf, 3d ed., sec. 218, on the subject of confessions, it is said: "The evidence must be confined to his confessions in regard to the particular offense of which he is indicted. If it relates to another distinct offense it is inadmissible." Reg. v. Butler, 2 Cor. & Ker. 221; *Vide*, also, State v. Goetz, 34 Mo. 85; State v. Harrold, 38 Mo. 496; State v. Dunbert, 42 Mo. 242; State v. Maner, 71 Mo. 419; State v. Greenwade, 72 Mo. 298; State v. Martin, 74 Mo. 547; State v. Underwood, 75 Mo. 230; State v. Turner, 76 Mo. 351. The decision in State v. Underwood, *supra*, is correct, for the reason that in that case it was impossible to separate that portion of the conversation of the prisoner relating to the offense with which he was charged, from—that portion of the conversation relating to another offense.

The truth of all extra-judicial confessions is a matter for the jury, and not for the court. When incompetent or irrelevant testimony damaging to the defendant has been admitted, it is not for this court to usurp the province of the jury and declare that excluding such incompetent testimony the other evidence shows the defendant to be guilty. The case of Rex v. Bull, Russ & Ry., cited in the opinion of the majority, can not be accepted as an authority to the contrary. That decision was put expressly upon the ground that there could be no new trial for felony. Chambers, J., said: "If it were clearly made out by the proper evidence in such a way as to leave no doubt of the guilt of the prisoner in the mind of any rea-

sonable man, they thought that as there could not be a new trial in felony such a conviction ought not to be set aside because some other evidence has been given which ought not to have been received; but if the case without such improper evidence were not so clearly made out, and the improper evidence might be supposed to have had an effect in the minds of the jury, it would be otherwise."

In the contingency last, stated the admission of the illegal testimony, would operate as an acquittal under the law in force in England, when that decision was rendered, or the pardon of the accused recommended. A different rule prevails in this country and the case cited is therefore inapplicable. I am of opinion that the judgment of the circuit court should be reversed and the cause remanded, in order that the defendant may be convicted by a jury on legal and competent testimony, before he is punished.

WEEKLY DIGEST OF RECENT CASES.

1. ADMINISTRATION—LUNATIC'S ESTATE.

The committee of a lunatic's estate rented the farm to himself. *Held*, that as he had done this at the urgent solicitation of the heirs and others interested in the estate, and as the auditor found that the committee had been exceedingly vigilant, and had managed the renting of the property to the great advantage of the estate, he should not be deprived of any part of his commission, or made to pay more rent than a third party. *Pierce's Appeal*, S. C. Pa., March 5, 1883; 14 Pittsb. L. J. 32.

2. BANK—INSOLVENCY—TRACING TRUST FUNDS.

Complainant sent a draft to a bank for collection, charged with a trust to pay the proceeds to complainant. The officers of the bank knew that it was insolvent at the time. The bank kept the proceeds and mingled them with its own funds. *Held*, that complainant must trace the funds into the hands of the receiver of the insolvent bank before he can charge him with the duty of recognizing his equitable title. A *cestui que trust* can not follow his fund into the hands of an assignee or executor of the trustee, but must occupy the position of a general creditor of the estate if the proceeds have been mingled with other moneys so that they are indistinguishable. *Illinois Trust & S. Bk. v. First Nat. Bk.*, U. S. C. C., D. N. Y., March 16, 1883; 16 Rep. 261.

3. CARRIERS OF PASSENGERS—THROUGH TICKET—CONNECTING LINES.

1. When a through ticket is issued by one railroad to a passenger for his transportation over said road and other connecting railroads and steamboat lines, the road issuing the ticket is liable for the safe transportation of the passenger over the various roads and lines named in the ticket, notwithstanding a stipulation on the ticket to the effect that the company issuing the ticket acted as agent and was not responsible beyond its own line, such stipulation not having been signed by the passenger. 2. Where parties purchased tickets at Macon for Galveston via New Orleans and the Morgan line of steamers, and on their arrival at New Orleans they found that the steamers had ceased running because of a quarantine against yellow fever, and without attempting to proceed to Galveston by any other route, they returned to Macon and brought suit against the road selling them the ticket. *Held*, that a charge that they would be entitled to recover the cost of their transportation back to Macon, their traveling expenses and for lost time, laid down an improper rule as to damages. Plaintiffs would be entitled to recover what it would have cost them to have reached their destination by other means than by the Morgan line of steamers, including reasonable pays for delays, and it might be also for such special damage as they may have sustained by reason of such delay. 3. If it should appear that no quarantine existed when the tickets were sold and that subsequent to the purchase of the tickets by the defendants in error that the steamers on the Morgan line were withdrawn in consequence of the prevalence of yellow fever in New Orleans or elsewhere, then the plaintiff, in the court below, would not be entitled to recover anything. 4. But if it shall be made to appear that the steamers had been withdrawn when the plaintiffs purchased their tickets and they proceeded to New Orleans on their journey and there was no other convenient or expeditious way by which they could reach Galveston, then they would be entitled to their expenses, and the rule given by the court below would be applicable. *Central Railroad and Banking Co. v. Combs*, S. C. Ga., Sept. 1, 1883.

4. CORPORATION — SUCCESSION — DEBTS OF OLD COMPANY.

Where a new corporation takes all the property of an old company, leaving nothing to pay the debts of the latter, and takes it not as creditor but as owner, it must pay the debts of the old company to the extent of the value of the property received. *Brum v. Merchants' Mut. Ins. Co.*, U. S. C. C., E. D. La.; 16 Rep. 260.

5. FRAUD—MISREPRESENTATION—"LEGAL FRAUD"—"MORAL FRAUD."

After a purchaser of real property has taken a conveyance, and the purchase money has been paid, no action will lie for compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such errors amount to a breach of contract or warranty contained in the conveyance itself, or unless some fraud or deceit has been practised upon the purchaser. "Legal fraud" as distinguished from "moral fraud" does not exist, moral turpitude being in all cases necessary to support an allegation of fraud. Where upon a treaty for the sale of real property the vendor *bona fide* represented the quantity of land to the purchaser as being three acres, whereas in truth it was 2a. 1r. 12p, and in the contract for the purchase the property was described as "containing by estimation three acres or thereabouts," and in the conveyance as two parcels each "containing by estimation one and a half acres more or less:" *Held*, that no action would lie, after the completion of the purchase, against the vendor for compensation. *Jolliffe v. Baker*,

Eng. H. Ct., Q. B. Div. June 26, 1883; 48 L. T. R. 966.

6. INSURANCE, FIRE—ASSIGNED AS COLLATERAL SECURITY—INCREASED RISK.

Where, by the terms of a policy of insurance, when the same has been transferred as collateral security to a mortgagee, and the transfer approved by the company issuing the policy, the insurance shall not be affected by any subsequent breach of the stipulations or conditions set out in the policy; but, in the event of a breach of any of the conditions, the insurance shall thenceforth stand in all respects as though originally effected upon such mortgage, notwithstanding the company is thereby made to assume a greater risk than was contemplated when the policy was issued. And where the company reserves the right of paying such mortgagee "such proportion of the sum insured as the damage by fire to the premises mortgaged or charged shall bear to their value immediately before the fire, but not exceeding such value." *Held*, that the company, having assented to the transfer of the policy of the mortgagees, voluntarily accepted the increased risk, and was liable to the mortgages for any loss occurring upon the insured premises. *Held* further, that the clause "the premises mortgaged or charged," embraced only the premises mortgaged which were insured. *Teutonia Fire Ins. Co. v. Mund*, S. C. Pa., Feb. 26, 1883; 14 Pitts. L. J. 27.

7. INSURANCE, LIFE — PAYMENT OF PREMIUMS — WAIVER OF FORFEITURE.

1. Where an insurance company refuses to receive from the assured a premium on a life policy, on the ground that the policy has lapsed by reason of the non-payment of such premium on the day stipulated for its payment, and the assured claims that the company has waived the right to assert such forfeiture, equity has jurisdiction to determine, on the petition of the assured, the rights of the parties under such policy, and, if the policy is found to be in force, to compel the company to receive the premiums thereon and issue renewal receipts. 2. Although a life policy and the renewal receipts may contain a stipulation or notice that agents of the company shall not have authority to waive forfeitures where premiums have not been paid on or before the day designated for their payment, yet the course of business between the agent, the assured and the company, in giving effect to payments made when overdue, may be such that the company will be precluded from objecting to a payment tendered when overdue, where no notice had been given the assured that in the future such overdue payments would not be received. *Insurance v. Tullidge*, S. C. Ohio, June 26, 1883; 4 Ohio L. J. 96.

8. NEGLIGENCE — DEFECTIVE HIGHWAY — UNGUARDED CULVERT.

The plaintiff, while walking along a highway upon a dark night, turned aside for the purpose of taking a foot-path which led through private property, and, by reason of a miscalculation as to his position, fell over the ungarded edge of a culvert and sustained severe injury thereby. It was in evidence that he was familiar with the condition of the place, having habitually travelled that way about fifteen years, and that, if he had not attempted to leave the street, the accident would not have occurred. *Held*, that the municipality was not liable. *City of Scranton v. Hill*, S. C. Pa., May 7, 1883; 40 Leg. Int. 344.

9. NEGOTIABLE PAPER—TRANSFER AFTER MATURITY.

If the party who has transferred a negotiable note to the holder had acquired the note before maturity and was himself unaffected by any infirmity in it, the holder acquires as good a title as he held, although it was overdue and dishonored at the time of transfer. *Bank of Sonoma v. Goue*, S. C. Cal., May, 1883; 16 Rep. 263.

10. SHERIFF'S SALE—RIGHTS OF JUDGMENT CREDITOR.

On a sheriff's sale a judgment creditor is not a purchaser, and has no equity as such. He stands on on the footing of his debtor, and is entitled to the protection of a purchaser of the legal title against an equitable owner or his creditors, or to take any advantage which his debtor had not. The declaration of a purchaser, made at the time of the purchase, that he was buying with another's money, is admissible as part of the *res gestæ*, upon a question of title. *Layton v. Brightfield*, S. C. Pa., Dec. 30, 1882; 14 Pitts. L. J. 30.

11. STOPPAGE IN TRANSITU — EXPIRATION OF RIGHT.

A purchaser ordered goods, purchased from W & Co., to be sent by rail to G, and at the same time (un-known to the vendors) instructed M. S & Co. to ship the goods on their arrival at G to R. Some delay occurred at G owing to there being no ship ready to take the goods, and they were warehoused by the railway company at M. S & Co.'s risk. Whilst there they were stopped by the vendors. *Held*. that as between the vendors and the vendee, the right to stop the goods was at an end when the goods had arrived at G, and when the railroad company no longer held the goods as carriers; for the goods were then in the constructive possession of the vendee, the defendants M. S & Co. being the agents appointed by the vendee to receive and forward the goods upon the fresh journey to R. *Kendall v. Marshall*, Eng. Ct. App.; 48 L. T. R. 951.

12. TORT — ILLEGAL DETENTION OF IMPOUNDED ANIMAL—VOLENTI NON FIT INJURIA.

After a horse had been impounded under Pub. St. R. I., ch. 108, the pound-keeper neglected to give the statutory notices which were to be given after the expiration of forty-eight hours, but gave the owner of the animal verbal notice of the impounding immediately after it took place. In an action brought by the owner against the pound-keeper for illegal detention. *Held*, that the plaintiff could not recover. "*Volenti non fit injuria.*" *Sweeny v. Sweet*, S. C. R. I., June 16, 1883; R. I. Index, March Term, Providence Co., 1883, p. 43.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The querie must be brief; long statements of facts of particular case must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

66. A and B own a tract of land in common. A mortgaged to C his half interest in said land to secure a promissory note executed by him alone. After ma-

turity of the note C entered into a contract and agreement with A and B for the sale and purchase of the whole tract. No part of the purchase money was paid, and no mention was made of the mortgage or the mortgage debt. Did C lose his mortgage interest in the land by entering into that contract? Q. E. D.

68. A erects a building on his lot, the south wall resting on a thick foundation wall which extends out south of the house. He builds another house close, south of the first, and resting on the same foundation wall, with a front of twenty feet, and reaching, as he thinks, just up to the southern line of his lot. Both A and B having this impression, and A desiring to sell and B to buy the last named house with the land under and back of it, A gives to B a deed of the south twenty feet of said lot, containing the usual covenants and an agreement that the above-mentioned foundation wall shall be a party wall. It is afterward discovered that the southern building extends four inches south of the lot into C's land, and consequently the land described in the deed reaches four inches into the south wall of the northern building, which A still occupies. What are the rights of A and B? Can A bring ejectment for the four inches covered by the northern house? Can he tear down so much of the wall as stands on the four inches, and appropriate the materials? Can he recover damages, and if so, what is the measure of damages? If A can obtain title to the north four inches of C's land, has he the right to demand the reformatian of the deed so as to conform to the original intent of the parties?

69. A entrusts his goods to B, a factor, to sell on commission, B takes the goods to C, and hires them stored pending the sales. B sells a part of the goods and then abandons then on C's premises. C makes a demand on A the owner for the storage. A denies his liability, demands his goods of C, and offers to take them away. C refuses to give them up but instead wrongfully sells them and keeps the money. In an action by A against C for conversion, C sets up his claim against A for storage, in nutigation of damages. Has C, under the circumstances, any claim against A which he can so rely upon? The question is, if a commission merchant or factor takes the goods of his principal to a warehouseman and hires them stored, from these acts can a contract be implied on the part of the owner of the goods to pay for their storage? or is the factor such an agent as that these acts will bind the owner to pay the storage, the lien, if any, having been lost? H.

Boston, Mass.

RECENT LEGAL LITERATURE.

EIGHTH SAWYER.—Reports of Cases decided in the Circuit and District Courts of the United States for the Ninth Circuit. Reported by L. B. S. Sawyer, Vol. 8. San Francisco, 1883: A. L. Bancroft & Co.

The most notable case in this volume is the Railroad Tax Case, as it is termed, or more properly, County of San Mateo v. Southern Pacific R. Co., in which the principle is laid down that the fourteenth amendment of the constitution in declaring that no State shall deny to any person within its jurisdiction, the "equal protection of the laws" imposes a limitation upon the exercise of all the powers of the State, which can touch the individual or his property, including among them that of taxation; and that the "equal protection of the laws" to any one, implies not only that he has a right to resort on the same terms with others to the courts of the country for the security of his person and property, the prevention and redress of the wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed on all others under like circumstances. This equal protection forbids, unequal exactions of any kind and among them that of unequal taxation.

TWELFTH BRADWELL. Reports of the Decisions of the Appellate Courts of the State of Illinois. By James B. Bradwell. Vol. 12. Containing all the remaining Opinions of the First District up to and including a Portion of those Filed on the Twenty-fourth Day of April, 1883, and all the remaining Opinions of the Second, Third and Fourth Districts, up to the Twenty-sixth Day of June, 1883. Chicago, 1883: Chicago Legal News Co.

This volume is gotten up in the usual excellent style of this series, both as to matter and manner, and makes its appearance with the customary promptness after the rendition of the decisions reported. Our Illinois brethren are to be congratulated upon the fact that the reporting and printing of these decisions are in such excellent hands.

LEGAL EXTRACTS.

HOW TO EXPLAIN TO YOUR CLIENT WHY YOU LOST HIS CASE.

The following speech was delived by Byron Bacon, Esq., of Louisville, at the banquet of the Kentucky Bar Association in Louisville, June 30, 1883: Mr. Byron Bacon, in an inimitable style, told "How to explain to your client why you lost your cause." I deprecate any thought that I respond because, from a more extended experience than my legal brethren, I bring to the solution of this question the exhaustive learning and skill of the specialist. The characteristic modesty of our profession forbids that I should arrogate to myself to instruct the eminent lawyers around me wherein they doubtless have attained the perfection that only long practice can give. I therefore assume that the subject was proposed for the edification of the novitiates, those young gentlemen to whom Blackstone so often and so feelingly alludes, who, after a long and laborious course of study, have been found, upon an examination by the sages of the law, not to have fought a duel with deadly weapons since the adoption of the new Constitution, and have been admitted to our ranks. To them, then, I shall offer briefly some suggestions upon this point, hoping that they may

not have need of them upon the termination of their first case.

The question as framed is not unlike that with which Charles II. long puzzled the Royal Society. He demanded the cause of phenomena, the existence of which he falsely assumed. The answer was simply the denial of the existence of the phenomena. What lawyer ever attempted to explain the loss of a case upon the hypothsis that he had lost it?

That a lawyer can not lose a case is as well established a maxim as that "the king can do no wrong," or that a tenant can not deny his landlord's title. Eliminate this error in our question, and it is easy of solution. Coke tells that "law is the perfection of human reason;" Burke, that it is the most excellent—yea, the exactest of the sciences; and the eloquent Hooker, that her seat is the bosom of God, her voice the harmony of the world, all things in heaven and on earth do her homage—the least as feeling her care and the greatest as not exempt from her power. But we know that if it it be the purest of reason, the exactest of sciences, its administration is not always intrusted to legal scientists or the severest of logicians. We know that the great, the crowning glory of "our noble English common law," is its uncertainty, and therein lies the emolument and pleasurable excitement of its practice.

If, oblivious of this, you shall have assured your client of success in the simplest case, the hour of his disappointment will be that of your tribulation, for which professional experience can extend to you no solace or aid. But your client's cause has resulted unfavorably. You, of course, are never to blame; the fault is that of the judge, the jury, or your client himself, and, it may be, of all three. It becomes your duty to divert the tide of your client's wrath into those channels where it can do the least possible harm. If he be a crank and shoots the judge or cripples a juryman, they fall as blessed martyrs, and their places and mantles are easily filled; but the place of the lawyer is not readily filled, as one of America's sweetest poets, Mr. George M. Davis, has beautifully expressed it in a touching tribute to our professional worth, which for delicacy of sentiment, boldness of imagery and beauty of diction, is unequaled in the whole range of English poesy:

"Judges and juries may flourish or may fade;
A vote can make them as a vote has made;
But the bold lawyer, a country's pride,
When once destroyed can never be supplied."

The selection, then, of a target for your client (I use the word target metaphorically), must rest upon the peculiar facts and circumstances of the case and the "sound discretion," as the venerable Story has it, of the counsel. But avoid, if possible, imputing the blame to your client, for although I have known this to be attended with very happy results, yet his mood at such times is apt to be homicidal, and besides, you should bear in mind that your aim is to conciliate him.

First, as to the jury. Upon this head I need not enlarge, but only remind you that you are not held by the profession as committed or estopped by any eulogism, however glowing you may have pronounced during the progress of the trial on their intelligence or integrity. It is only in the capacity of a scape-goat that the American juror attains to the full measure of his utility, and as such he will ever be regarded by our profession with gratitude not unmingled with affection.

But it is to the Judge that we turn in this extremity with unwavering confidence. The serenity and grandmotherly benignity that sits enthroned upon his visage is to the layman that placidity of surface which indicates fathomless depths of legal lore; to the lawyer it bespeaks the phlegmatice temperament of one whose mission to bear unmurmuringly the burdens of others.

It comes upon you like a revelation that your elaborate preparation, your weeks of study, your voluminous brief, are all for naught; that the impetuous torrent of your eloquence has dashed itself against his skull only to envelop it in fog and mist, and, more in sorrow than in anger, you confess that the presumption that every man knows the law can not be indulged in his favor. Even your luminous exposition has failed to enlighten him. You need not spare him. He thrives on abuse. Year in and out he bears the anathemas of disappointed lawyers and litigants with the stolid indifference of Sancho Panza's ass in the valley of pack-slaves or under the missiles of the galley-slaves, and society comes finally to regard him pretty much as was Sancho's ass. It berates him, overtasks him, half-starves him and loves him.

But seriously considered, our question is but a long-standing and harmless jest of the bar meaningless in actual practice.

The lawyer is untiring in his client's behalf, and his client knows, whatever be the result, that he has had the full measure of his lawyer's industry, zeal and ability, and requires no explanation.

Lord Erskine said that in his maiden speech "he felt his children tugging at his gown and heard them them cry, 'Father, now is the time for bread.'" The British bar applauded the sentiment. But the American lawyer throughout the case feels his client tugging at his gown, and, if unsuccessful, is sustained by the consciousness that he has done his whole duty as God has given him to see and perform it, and if he wants further consolation he can open one of the oldest of all the books of the law and there read these words, which will soothe his wounded spirit and possibly best answer the question of tonight:

"I turned and saw under the sun that the race is not to the swift, nor the battle to the strong, neither yet is bread to the wise, nor yet riches to the man of understanding, nor yet favor to the man of skill, but time and chance happeneth to them all."